

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

ARTHUR DECARLO, JR, Personal
Representative on behalf of the Estate of
his father, ARTHUR DECARLO, SR. in
his individual capacity, and on behalf of his
father's heirs and next of kin,

Plaintiff-Respondent,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant-Appellant.

Index No. 161644/2015

Hon. Manuel J. Mendez

PRE-ARGUMENT STATEMENT

Pursuant to Section 600.17 of the Rules of the Appellate Division of the Supreme Court, First Judicial Department, Defendant-Appellant the National Football League ("NFL") submits this Pre-Argument Statement.

1. Title of Action: The title of the action is as set forth in the caption above.

2. Full Name of Original Parties: The names of the original parties to the action are as set forth in the caption above.

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5. Court and County from which Appeal is Taken: This appeal is taken from the Supreme Court, New York County (Hon. Manuel J. Mendez).

6. Nature and Object of the Underlying Action: Through his Complaint, Plaintiff-Respondent, the personal representative of the Estate of Arthur DeCarlo, Sr. (“DeCarlo”), purports to assert causes of action for negligence, negligent hiring and retention, fraud, fraudulent concealment, negligent misrepresentation, conspiracy, and wrongful death/survival arising out of decedent DeCarlo’s career as a professional football player from 1953 to 1961. Plaintiff-Respondent alleges that DeCarlo’s career exposed him to repetitive head impacts, and as a result, he suffered neurological injuries, including dementia, Alzheimer’s disease, and Chronic Traumatic Encephalopathy (“CTE”). Plaintiff-Respondent claims that DeCarlo suffered these injuries as a result of Defendant-Appellant’s failure to enact safety guidelines and inform players of foreseeable harm from head injuries, and as a result of

Defendant-Appellant's concealment of the risk of long-term neurological injuries from repetitive head trauma.

On February 1, 2016, the NFL moved to dismiss the Complaint on the grounds that (i) the applicable statute of limitations barred each of Plaintiff-Respondent's causes of action because they were based on injuries sustained six decades ago and, in any event, DeCarlo discovered that NFL Football purportedly caused his neurocognitive injury by 2005 at the latest when he received a diagnosis of dementia "secondary to repeated injury received as a professional football player"; and (ii) the Complaint failed to state causes of action for negligent hiring and retention, fraud, fraudulent concealment, negligent misrepresentation, conspiracy, and wrongful death/survival.

7. Result Reached in the Court Below: The trial court denied Defendant-Appellant's motion to dismiss the Complaint.

8. Grounds for Seeking Reversal: The decision denying Defendant-Appellant's motion to dismiss should be reversed for at least two reasons. First, the Court erroneously concluded that Plaintiff-Respondent's causes of action were timely under CPLR 214-c's "discovery rule." CPLR 214-c tolls the running of a statute of limitations pending discovery of a latent injury only where the plaintiff alleges exposure to toxic "substances." Here, the Complaint alleges DeCarlo was exposed to repetitive hits to the head, not to any "substance." The "discovery rule" therefore does not apply, and DeCarlo's decades-old claims are time-barred. Moreover, even if CPLR 214-c were to apply, Plaintiff's causes of action are nonetheless untimely where, as here, DeCarlo could have discovered his alleged injury through the exercise of reasonable diligence at least a decade before Plaintiff filed the Complaint in 2015. According to the Complaint, DeCarlo repeatedly sought medical attention for his neurocognitive

impairment, including when, in 2005, he received a specific diagnosis of dementia as “secondary to repeated injury [DeCarlo] received as a professional football player.” Consequently, as a matter of law, DeCarlo had sufficient notice of his purported injuries to commence the running of the statute of limitations by 2005 at the latest, and his causes of action therefore expired prior to the filing of the Complaint in 2015.

Second, the decision denying Defendant-Appellant’s motion to dismiss should be reversed because it incorrectly held that the Complaint adequately stated causes of action for fraud, fraudulent concealment, negligent misrepresentation, negligent hiring or negligent retention, civil conspiracy, and wrongful death/survival—even though the Complaint failed to allege numerous essential elements of those causes of action.

9. Related Actions or Proceedings: This action asserts causes of action based on the same purported conduct at issue in *In re National Football League Players’ Concussion Injury Litigation*, 12-MD-2323, currently pending before the Honorable Anita B. Brody in the United States District Court for the Eastern District of Pennsylvania. Since January 31, 2012, the Judicial Panel on Multidistrict Litigation has coordinated or consolidated as part of MDL 2323 over 300 concussion-related litigations on behalf of over 5,000 former NFL players against the NFL and NFL Properties LLC. On April 22, 2015, Judge Brody issued a Final Order and Judgment (as amended on May 8, 2015) granting final approval of a Class Action Settlement and certifying a Settlement Class consisting of “[a]ll living NFL Football Players who . . . retired . . . from playing professional football with the NFL or any Member Club,” their representative claimants, and their derivative claimants. The Settlement became effective on January 7, 2017.

Certain Settlement Class Members, including Plaintiff here, timely opted out of the Settlement. There are currently over 50 pending actions on behalf of over 90 Opt-Out

Plaintiffs in MDL 2323. On March 27, 2017, Judge Brody designated Plaintiff-Respondent's counsel here, Wendy Fleishman of Lieff, Cabraser, Heimann & Bernstein LLP, as Lead Counsel for the Opt-Out Plaintiffs in order to promote the efficient administration of pretrial proceedings. Discovery in MDL 2323 is stayed pending resolution of motion practice on certain threshold legal issues.

Dated: New York, New York
May 12, 2017

Respectfully submitted,

By: /s/ Brad S. Karp

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Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZPART 13*Justice*

ARTHUR DECARLO, JR., Personal Representative
on behalf of the Estate of his father,
ARTHUR DECARLO, SR. in his individual capacity,
and on behalf of his father's heirs and next of kin,

INDEX NO. 161644/2015
MOTION DATE 12/07/2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

-against-

NATIONAL FOOTBALL LEAGUE,
Defendant.

The following papers, numbered 1 to 6 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4;</u>
Answering Affidavits — Exhibits _____	<u>5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion: ☐ Yes ☒ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's motion to dismiss the Complaint, is denied.

Plaintiff is the personal representative of the estate for his father Arthur DeCarlo, Sr. (herein "DeCarlo"). Plaintiff commenced this action on November 11, 2015, asserting causes of action as follows: (1) counts one and two- fraudulent concealment and fraud; (2) count three- civil conspiracy; (3) counts four and five- negligence; (4) count six (misabeled as count seven)- negligent misrepresentation; (5) counts seven and eight (misabeled as counts eight and nine)- negligent hiring and retention; and (6) count nine (misabeled as count seven)- wrongful death and survival. DeCarlo played football for Defendant from 1953 to 1961.

Plaintiff alleges that as a result of playing football, DeCarlo suffered neurological injuries from repetitive head trauma sustained during his football career, and died from complications of dementia. That upon DeCarlo's death his brain was examined and it was determined that he had Alzheimer's disease and Chronic Traumatic Encephalopathy (herein "CTE")- a neurological illness that results from concussions due to repetitive head-trauma. That DeCarlo suffered these injuries as a result of the Defendant's failure to enact safety guidelines during his football career, and that Defendant assumed a duty to inform its players of foreseeable harm for head

injuries, including the risk of neurocognitive disabilities for athletes exposed to Mild Traumatic Brain Injury (herein "MTBI"). That Defendant concealed (through misrepresentations and omissions) the risk of long-term brain damage from repetitive head trauma and concussions.

Defendant now moves to dismiss the Complaint pursuant to CPLR 3211(a)(5) and (7), arguing that the claims are time barred and fail to state a cause of action.

Defendant argues that the causes of action are time-barred pursuant to the applicable statute of limitations: (1) three years from accrual of the negligence causes of action; and (2) two or six years, depending on the circumstances, from accrual of the fraud-based causes of action, and thus, that these causes of action expired over fifty years ago when they accrued at the time DeCarlo retired from football. Defendant also argues that the statute of limitations for civil conspiracy is that of the underlying tort, that the conspiracy claim is based on Defendant's alleged fraudulent concealment of progressive long-term neurological injuries resulting from repetitive head trauma, and that, therefore, the conspiracy cause of action is likewise time-barred.

Defendant also contends that the causes of action are time-barred even if Plaintiff argues that they are based on the cognitive injury manifesting after DeCarlo's retirement. That based on the Complaint, DeCarlo began experiencing symptoms of extreme headaches, memory loss, and mild confusion in 1993, that he sought and received medical attention for these symptoms between 1995 and 2005. That DeCarlo was diagnosed in 2005 with having atrophy and ventricular enlargement of his brain as secondary to repeated injury from playing football, and that, therefore, the causes of action accrued when these conditions were discovered in 2005.

Defendant also argues that the Complaint fails to state a cause of action for:

(1) fraud because the Complaint does not identify any representation made by Defendant, that only conclusory allegations of concealment are plead, and that the Complaint does not plead with particularity that DeCarlo justifiably relied on any alleged misrepresentation to his detriment;

(2) negligent hiring or retention because the Complaint does not plead the identity of the specific MTBI Committee members employed by Defendant, and does not allege that Defendant knew or should have known any alleged employee's propensity for the sort of conduct complained of. Further, the Complaint fails to sufficiently allege how the hiring and retention of MTBI Committee members, decades after DeCarlo retired, caused him harm, or that the employees were acting outside the scope of employment;

(3) civil conspiracy because the Complaint does not allege the central element that two or more people agreed to commit an unlawful act, that conspiracy is not actionable without allegations of an intentional tort, and that the claim for fraudulent concealment that the conspiracy claim is based on, is deficiently pled because there

was no fiduciary relationship duty to disclose, and mere silence is not sufficient, and;
(4) wrongful death/survival because the substantive causes of action are time-barred.

Plaintiff opposes the motion arguing that the statute of limitations for his claims run from DeCarlo's date of death on December 21, 2013, and, therefore, the actions are not time-barred.

Plaintiff contends that the claims did not mature until after DeCarlo's death, that wrongful death and survival actions accrue at the time of the decedent's death. That Plaintiff is alleging that Defendant failed to warn the players, the public and the healthcare community of football's risk of causing CTE, and that this failure to warn left DeCarlo at risk for both CTE and with no ability to recognize the symptoms consistent with the damage caused to his brain by repetitive trauma. That the suit is for both the injury done to DeCarlo when he played football, ignorant of its risk of brain damage, and damages suffered during his lifetime after retirement, and that the wrongful death and survival actions therefore accrued when the CTE was diagnosed after DeCarlo's death.

Plaintiff argues that a Plaintiff can still commence a wrongful death suit after missing the statute of limitations if the Defendant prevented the suit from being commenced by the use of fraud or misrepresentation. That the fraudulent concealment tolled the action until at least 2013 when the CTE was diagnosed, especially since it is clear that there is a connection between CTE and playing football. That the allegations of fraudulent concealment and negligence are adequately plead, and were hidden and undiscoverable until the CTE was diagnosed after DeCarlo's death in 2013.

Plaintiff contends that Defendant has failed to satisfy its burden proving that the statute of limitations has passed. That although Defendant argues that certain symptoms and doctor's visits put DeCarlo on inquiry notice of his dementia and Alzheimer's condition, there is no basis to argue that such notice precludes this suit based on the disease of CTE which could only, and was only, diagnosed after DeCarlo's death and post-mortem autopsy of his brain. Plaintiff argues that the Complaint makes clear that the triggering event for accrual purposes was the post-mortem diagnosis of CTE as there is no ability to definitively diagnose CTE until after death.

Plaintiff also contends that all of the claims are sufficiently plead. That the fraud claims sufficiently assert the who, what, where and when of DeCarlo never being told of the association between multiple hits to the head and CTE, or how to define and identify pre-death CTE symptoms. That without Defendant disclosing that dementia could be a pre-mortem symptom of CTE, and because CTE could only be identified and diagnosed at death, there was no way of knowing the risk or the cause without this information being divulged by Defendant. That the Complaint sufficiently pleads

that the Defendant ignored, minimized, disputed and suppressed the consensus that CTE was linked with repeated blows to the head, including the MTBI Committee picked by Defendant who produced fraudulent peer-reviewed research on head trauma.

Plaintiff further argues that the negligence claims are based on the Defendant as the guardian of the game of football and player-safety, that Defendant made all of the rules, including health and safety, and that nothing was done to protect players although Defendant had reason to know of the link between brain injuries and repetitive hits to the head. That although Defendant had accumulated knowledge internally (repository of records and data on injury, and externally (the peer-reviewed scholarship on long-term risk of repetitive head trauma), it failed to take measures to protect the players.

Plaintiff also contends that there is no requirement of a fiduciary relationship in order to plead fraud or concealment, and that the Complaint sufficiently pleads reliance and causation by linking the alleged fraudulent acts and misrepresentations with DeCarlo's injuries. That the negligent hiring and retention claims are adequately plead as they sound in ordinary negligence, and the Complaint asserts that the MTBI Committee was created by Defendant to undertake good-faith research, but actually created sham-science.

Applying New York law, in general, "whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" pursuant to CPLR § 3211 (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, at 19, 799 N.Y.S.2d 170, at 175, 832 N.E.2d 26, at 31 [2005]). To dismiss an action as time-barred under CPLR § 3211(a)(5), the statute of limitations must have expired. The statute of limitation begins to run when a cause of action accrues, that is, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court (Aetna Live and Cas. Co. v. Nelson, 67 N.Y.S.2d 169, 501 N.Y.S.2d 313, 492 N.E.2d 386 [1986]).

Actions to recover for malpractice or negligent misrepresentation are governed by a three-year statute of limitations (See CPLR § 214). Claims for negligent hiring and retention are also governed by the three-year statute of limitations of CPLR 214, applicable to negligence generally. (Schrack v. Lederman, 52 A.D.3d 494, 860 N.Y.S.2d 556 [2nd Dept. 2008]). The time in which an action for fraud must be commenced "shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." [See CPLR 213(8)].

The statute of limitations for civil conspiracy is that of the underlying tort, meaning that a Plaintiff's tort claims must be viable and timely in order for those claims to form the basis for a civil conspiracy cause of action. (Thome v. Alexander & Louisa Calder Foundation, 70 A.D.3d 88, 890 N.Y.S.2d 16 [1st Dept. 2009], see also Schlotthauer v. Sanders, 153 A.D.2d 729, 545 N.Y.S.2d 196 [2nd Dept. 1989]). Actions

to recover for wrongful death and survival must be commenced within two years after the decedent's death. (See EPTL §5-4.1).

The date of Mr. DeCarlo's death is December 21, 2013. Plaintiff commenced this action on November 15, 2015. Therefore, Plaintiff's claims are timely as the date of accrual for the causes of action under these circumstances was the date of DeCarlo's death.

These concussion cases involving the Defendant are relatively new, and case law on point involving latent head injuries is lacking. An article published in the New York State Bar Journal addressed statute of limitations issues with regards to football related head injuries. "Football-related head trauma can be likened to asbestos exposure in that damage caused by both can take up to 20 to 40 years to manifest." (Joseph M. Hanna, Concussions May Prove To Be A Major Headache For The NFL, 84-OCT N.Y. St. B.J. 10 (2012)). That studies have shown an indeterminate gestation period, that usually personal injury actions have a two to four year time period to file a claim, and that "to be fair to people with latent injuries, most states have adopted the 'discovery rule.'" (Id.). Further, the article states that "...NFL alumni should be able to invoke the discovery rule because cognitive illnesses caused by multiple concussions (e.g., CTE, dementia, Alzheimer's, depression) represent exactly the type of latent injuries the rule was intended to address." (Id.).

"CPLR 214-c was enacted...to ameliorate the effect of a line of cases holding that toxic tort claims accrued upon the impact or exposure to a substance, even though the resulting injury did not manifest itself until some time later... [and] provides for a three-year limitations period for actions to recover damages for injuries to person or property 'caused by latent effects of exposure to any substance...and is computed 'from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.'" (In re New York City Asbestos Litigation, 53 Misc.3d 579, 39 N.Y.S.3d 629 [1st Dept. 2016], see also CPLR 214-c).

"...[D]iscovery occurs when the 'injured party discovers the primary condition on which the claim is based.'" (In re New York City Asbestos, Supra, citing MRI Broadway Rental v. United States Min. Prods. Co., 92 N.Y.2d 421, 681 N.Y.S.2d 783, 704 N.E.2d 550 [1998], see also Matter of New York County DES Litigation, 89 N.Y.2d 506, 678 N.E.2d 474, 655 N.Y.S.2d 862 [1997]- where the Court held that where a "...claimant may experience early symptoms that are too isolated or inconsequential to trigger the running of the Statute of Limitations...the discovery of the injury occurs...when the plaintiff is diagnosed with the primary condition for which damages are sought." The Court stated that it need not decide where the threshold lies to determine when the statute of limitations is triggered because the Plaintiff was "formally diagnosed [with] the very abnormalities that constitute the harm for which she seeks recovery.")

Plaintiff's causes of action are not time-barred as they are premised on the cause of DeCarlo's neurological illness, CTE, not being discoverable until an autopsy was performed after his death. This type of latent disease is comparable to asbestos cases where the injury occurred outside of the statute of limitations period, however, the manifestation of the disease or illness is not developed or detected until years later. If Plaintiff was suffering from a latent condition, and the ability to diagnose the condition is not available until the death of the injured party, then under the discovery rule the cause of action arises upon the discovery of the latent disease, i.e. at the time an autopsy is performed.

On a motion to dismiss an action pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts alleged in the pleading to be true, afford the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v. Martinez 84 N.Y.S.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511). The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (Union Brokerage, inc., v. Dover Insurance Company, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st. Dept. 1983]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (Quinones v. Schaap, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2nd. Dept. 2012]).

Affording the pleading a liberal construction, accepting all facts alleged in the Complaint to be true, the Complaint states causes of action cognizable at law. All of Plaintiff's claims have been sufficiently plead to state recognizable causes of action.

Accordingly, it is ORDERED, that Defendant's motion to dismiss the Complaint as time-barred, and for failure to state of cause of action, is denied, and it is further,

ORDERED, that the parties appear for a Preliminary Conference at IAS Part 13, 71 Thomas Street, Room 210, on March 29, 2017, at 9:30 a.m.

ENTER:

Dated: January 26, 2017

MANUEL J. MENDEZ

J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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